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Supreme Court of the United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,

Petitioner,

v.

CHARLES T. VON DER AHE AND CHROMA LIGHTING,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

MOTION OF HEWLETT-PACKARD COMPANY AND COMPAQ COMPUTER CORPORATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICI CURIAE*

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Hewlett-Packard Company ("H-P") and Compaq Computer Corporation ("Compaq") respectfully move for leave to file the attached Brief *amici curiae* in support of the Petition for a Writ of Certiorari. The consent of Petitioner was obtained, and is on file with the Clerk. The consent of Respondent was requested but refused.

The interest of H-P and Compaq in this case arises from their position as leading manufacturers in the dynamic computer industry. Both manufacturers distribute information technology products through complex distribution mechanisms, in competition with other personal computer ("PC") makers with similar distribution mechanisms and with direct-selling manufacturers.

The Brief which *amici curiae* request permission to file will contain a more complete description of the importance of the decision of the Ninth Circuit for the personal computer industry. The intense price competition, complex and varied distributional structures (including direct electronic sales to end users), and rapid technological innovation which are characteristic of the PC industry will magnify the adverse consequences of the Ninth Circuit's decision. Further, the conflict among the courts of appeals on the legal issue of whether an inference of injury to competition may be rebutted by evidence of healthy competition in the relevant market creates intolerable uncertainty for companies, like *amici*, that operate nationwide distribution systems.

On the merits, the Brief that H-P and Compaq request permission to file sets forth additional legal arguments, not suggested by the Petitioner. The Brief argues that the Ninth Circuit's holding, that an inference of injury to competition may not be rebutted by actual evidence of healthy interbrand competition, misconstrues the law and retards innovative distribution methods. By exposing manufacturers to

increased litigation risk for price concessions to distributors, the decision threatens to rigidify price structures and thereby to prevent price reductions beneficial to consumers that increase access to key technology. The Petition raises an important legal question that warrants review by the Court at this time.

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INTERESTS OF *AMICI CURIAE*[1]

Hewlett-Packard Company ("H-P") and Compaq Computer Corporation ("Compaq") submit this Brief *amici curiae* in support of the Petition for a Writ of Certiorari. The Court should grant review because the Ninth Circuit's decision adversely affects all product vendors, including personal computer ("PC") manufacturers. The Ninth Circuit held that, under Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)), an inference of injury to competition, arising out of mere proof of higher prices to the plaintiff, may not be rebutted by actual evidence of healthy interbrand competition in the favored purchaser's market. That decision misconstrues the statute and will deter innovation in product distribution.

H-P and Compaq are leading manufacturers of PCs, a dynamic industry driving the United States economy. They sell PCs and other information technology products through various distribution mechanisms, including a traditional three-tier system (manufacturer, distributor, reseller/retailer); a two-tier system (manufacturer-reseller); and, to a limited degree, by direct sales to end-users. They compete with other PC makers which operate similar distribution systems and also with manufacturers which sell directly to end-users via telephone, mail order and the Internet. Some of their competitors communicate prices directly and instantaneously to interested buyers through their Internet web-sites. H-P and Compaq also compete with low cost assemblers, known as "screwdriver shops," which produce PCs by combining commercially available parts. The PC market is highly competitive at the manufacturer and distributor levels, and is

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[1] No counsel for any party had any role in authoring this Brief, and no person other than the named *amici* made any monetary contribution to its preparation or submission.

characterized by constant technological innovation. Every day, functionality increases as prices fall in this evolutionary industry.

In managing their distribution networks, H-P and Compaq devote substantial attention to Robinson-Patman compliance issues and incur significant counseling costs. They are adversely affected by the court of appeals' decision, because it materially increases exposure to Robinson-Patman claims and exacerbates the conflict among the Circuits. By holding that an inference of injury to *competition*, arising out of an alleged injury to an individual *competitor*, may not be rebutted by evidence that competition was unaffected, the decision below will particularly affect companies like H-P and Compaq, which operate through multiple distribution mechanisms.

REASONS FOR GRANTING THE PETITION

Under the Ninth Circuit's holding, a plaintiff which proves that it paid a higher price than a competing distributor obtains a conclusive presumption that the "injury to competition" element of Section 2(a) has been satisfied. The question whether this inference may be rebutted with a showing that competition in the relevant market has not in fact been harmed is a recurring legal issue of great practical significance to manufacturers and resellers alike. This question warrants review by the Court.

There is a square conflict among the courts of appeals as to whether a seller may rebut a buyer's *prima facie* showing of injury to competition, based on an inference drawn from nothing more than the buyer's receipt of a less favorable price than another distributor, with evidence that competition in the relevant (buyer-level) market nonetheless

remains vibrant.[2] The issue is directly presented in this case, and there are no complicating issues, unique to this litigation, that might make it appropriate to await another case in order to resolve the conflict.

The conflict and resulting confusion in this area of law inhibit innovation by PC manufacturers in the design and management of their nationwide distribution systems. This confusion will result in significant additional counseling and compliance costs and will expose PC makers to substantial litigation risk. While manufacturers in other industries will be similarly affected, the impact will be particularly serious in the PC industry, which is marked by intense competition, rapid technological change, and direct electronic sales to end-users, all of which present manufacturers with frequent demands by distributors for price concessions.

On the merits, there are compelling reasons why the Court should grant review. First, the Ninth Circuit's decision ignored the literal language of Section 2(a) in several respects. While the language of Robinson-Patman invites fact finding on the element of injury to competition, the decision essentially eliminates this element of the offense. This result is contrary to prior decisions of this Court, which establish that the inference of harm to competition in a secondary-line Robinson-Patman case may be rebutted. Second, the decision is inconsistent with the Court's interpretation of Section 2(a) in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Finally, the decision interprets Section 2(a) in a manner inconsistent with the rest of the antitrust laws, by focusing on the harm to one *competitor,* rather than injury to

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[2] *Accord J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), *cert. denied,* 499 U.S. 921 (1991); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). *But see Boise Cascade Corp. v. FTC,* 837 F.2d 1127 (D.C. Cir. 1988).

competition. Section 2(a) contains several mechanisms that provide a substantial degree of protection to individual sellers, but Congress did not adopt the approach taken by the lower court of excluding evidence of competition on the "injury to competition" element.

I. THE NINTH CIRCUIT'S DECISION THREATENS SUBSTANTIAL HARM TO PERSONAL COMPUTER MAKERS

The Ninth Circuit's interpretation of Section 2(a) threatens to injure competition in the PC market by forcing manufacturers to adopt rigid pricing and distribution structures to avoid treble damage liability. If PC manufacturers cannot defend price concessions demanded by certain distributors with proof that competition in the plaintiff's market has not been harmed, they may well decide to forego price reductions that would enhance consumer welfare by promoting interbrand competition. While other industries will experience similar effects, the complexity of distribution arrangements, short product cycles, and intense price competition in the PC industry compound the impact of the Ninth Circuit's decision.

H-P and Compaq sell PCs through multi-tier distribution systems, focusing on different segments of the market with different resellers. Both companies sell lines or "families" of computers which are targeted primarily to either commercial or consumer end-users.

-- For commercial customers, H-P and Compaq sell primarily through large aggregators and distributors that purchase PCs from many manufacturers. These channels of distribution provide varying levels of additional customization, services, support and marketing assistance. H-P and Compaq channels then sell to authorized dealers; value-added resellers who add functionality and provide

services to customers; and other companies which sell directly to corporate end-users.

-- For consumer customers, H-P and Compaq sell PCs which are targeted to consumer preferences, and include features not found in PCs for the commercial market, such as multimedia packages, speakers and additional software aimed at individuals. In some cases, PCs are purchased by direct-buying retailers; in other cases, the computers are sold through aggregators or distributors which sell product on both the commercial and consumer sides of the business.

-- Compaq also sells a small number of PCs directly to end-users through a direct distribution program.

H-P, Compaq and other multi-tier computer sellers face intense competition from several PC manufacturers which sell directly to end-users, without intervening stores or distributors, through sophisticated telephone, mail order and Internet sales mechanisms. PC manufacturers also face competition from small "screwdriver" assemblers, which have captured a significant share of the market by selling PCs built from components directly to end-users. These direct sellers and screwdriver assemblers are essentially exempt from the Robinson-Patman Act due to their direct relationship with end-users. While technically covered by the Act, end-users in disparate businesses are not likely to suffer any injury, let alone antitrust injury, if they receive different prices.

The PC market in general has experienced rapid increases in output and substantial reductions in prices for a comparable level of performance. At the manufacturer level, the industry is highly competitive, with no producer enjoying more than 15% of the market. The market is highly competitive within each of several competing distribution models, and distribution systems continue to develop so that they better match evolving consumer purchasing preferences.

Further, continuous technological innovation means that the market life of a PC may be as short as six to nine months, after which the PC may be marketable only at a deep discount, even though it remains fully functional.

In this environment, a PC manufacturer is frequently presented with demands from specific distributors for unique price concessions to promote that manufacturer's product rather than another maker's PC in a specific market niche, or to develop the market for a new product by offering certain services to customers, or to compete for a specific order or group of orders. PC makers often have little time to consider these requests, given competitive pressures and the presence of direct sellers which post prices directly on the Internet. The ability to justify such a pricing decision for Robinson-Patman purposes by proof of vigorous interbrand competition may play a determining role in the manufacturer's decision to grant a price concession. However, the Ninth Circuit's decision that the inference of harm to competition may not be rebutted by actual market evidence threatens to chill these decisions and rigidify the PC pricing system and distribution structure.

The Ninth Circuit's interpretation of Section 2(a) will have several negative effects upon manufacturers, including H-P and Compaq. In particular, Robinson-Patman counseling will become conservative, constraining efficient distribution, due to uncertainty as to the state of the law. Pricing decisions will be driven, not by competitive considerations, but by the time and resources necessary to satisfy the requirements of the "meeting competition" and "cost justification" affirmative defenses. The administrative demands of these safe harbors are notoriously tricky even in sedate markets, let alone in rapidly evolving distribution

systems like those found in the PC market.[3] PC makers may be tempted to engage in product differentiation by adding costly but unnecessary features in order to create products that are of "unlike grade or quality" for Robinson-Patman purposes.[4] Finally, when considering the obsolescence rationale, a PC maker will face substantial jeopardy in deciding whether a fully functional product has outlived its utility in the market and thus justifies deep price discounting. Inventory management decisions of this sort are an important competitive factor in the PC market, where products become obsolete quickly and must constantly be priced in an aggressive fashion in order to sell.

The Ninth Circuit's decision also limits the ability of PC makers to target new markets and experiment with new distribution structures. For example, the market for small to medium-size businesses is not always served efficiently by the PC industry. There are few sellers which cater specifically to this segment and understand their hardware, software and set-up needs. However, under the Ninth Circuit's decision, PC manufacturers are constrained in their ability to offer lower pricing to a reseller which wishes to target this area and develop expertise in servicing this group of customers, even though such a discount would foster competition in the long run by focusing resellers on a previously underserved portion of the market. Similarly, PC makers may be constrained in their ability to use price concessions to encourage resellers which are experimenting with new marketing techniques or services, such as Internet selling or outsourcing of certain functions, even where those

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[3] *See* U.S. Department of Justice, *Report on the Robinson-Patman Act* 18-28 (1977)(hereinafter, *"DOJ Report"*).

[4] *See DOJ Report* at 75-79; KINTNER, FEDERAL ANTITRUST LAW § 31.10 (1983).

services may ultimately benefit the consumer and the market as a whole.[5]

Finally, the Ninth Circuit's decision may constrain the ability of PC manufacturers to adjust prices in response to short-term or localized fluctuations affecting particular markets or even particular distributors, such as component shortages, the introduction of new products, technical "bugs" or the normal give-and-take of supply and demand. PC manufacturers need the flexibility to deal with such common problems through pricing decisions in order to maintain their competitiveness.[6]

II. THE NINTH CIRCUIT MISCONSTRUED SECTION 2(a) IN BARRING USE OF EVIDENCE OF COMPETITION TO REBUT THE INFERENCE OF INJURY TO COMPETITION

The Ninth Circuit misconstrued the "injury to competition" element of Section 2(a). The court held that the plaintiff in a secondary-line case may conclusively demonstrate the prohibited effect on competition simply by showing that it has been charged a higher price than its

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[5] *See* KINTNER at § 31.8-31.9 (Robinson-Patman Act has been criticized for inhibiting entry into new markets and erecting obstacles to development of more efficient methods of distribution and resale); *DOJ Report* at 64-71. *See also* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 132 (1962)(interpretation of law to protect individual competitors is tantamount to a prohibition of limited experimentation with new price policies, adjustment of prices to varying conditions of demand, and response to competitive pressures that are not generalized).

[6] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION & ITS PRACTICE § 14.6 (1994)(Robinson-Patman Act has effect of overdeterring healthy pricing activity, deterring price cuts that are "part of the normal give-and-take" of the competitive market process); ROWE at 132.

competitor. This presumption, according to the court, may not be rebutted by proof that competition at the distributor level remains robust. This is a critical question for the enforcement of the Robinson-Patman Act on which the courts of appeals are divided.

The text of Section 2(a) demonstrates that evidence of actual competition in the affected market is relevant to resolution of the "injury to competition" element. Nothing in this Court's prior Section 2(a) decisions supports the lower court's conclusion that the *Morton Salt*[7] inference of harm to competition, which may be drawn from proof of price discrimination, may not be rebutted by evidence of competition. Further, the Ninth Circuit expressly declined to follow the principles set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. at 209, and its decision is inconsistent with that case in several respects. Finally, by ignoring this Court's explicit direction in *Brooke Group* that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws," 509 U.S. at 220, the Ninth Circuit aggravated a conflict between Section 2(a) and the other antitrust laws by equating injury to an individual competitor with injury to competition.

Like the other courts of appeals that have held that the presumption of injury to competition may not be rebutted with market evidence, the Ninth Circuit ignored the text of Section 2(a) and instead relied on selected portions of the legislative history. However, "the statute itself spells out the conditions which would make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960)

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[7] *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

Properly construed, Section 2(a) does evince a Congressional concern to provide protection to individual competitors. But it accomplishes this goal in other ways than outlawing evidence of the actual state of competition at the distributor level. First, the threshold for proving the "discrimination in price required to be proved in secondary-line cases" is set at a low level and "may be established by showing a mere price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. at 536. Second, Section 2(a) is an incipiency statute, under which the plaintiff need prove only that there is some likelihood that a given price discrimination "may . . . substantially lessen competition". Third, the plaintiff's evidentiary burden is further reduced by allowing it to make a *prima facie* showing of injury to competition through an inference generated by proof of a significant price difference sustained over time, thereby shifting to the seller the burden of rebutting the showing.[8]

These mechanisms provide a substantial degree of protection to individual competitors. Nothing in the text of Section 2(a) or its legislative history suggests that Congress went further, however, and made the inference of injury to competition irrebuttable, regardless of evidence of the state of competition at the distributor level.

In holding that the *Morton Salt* inference may not be rebutted with evidence that competition in the relevant market remains healthy, the Ninth Circuit has essentially treated Section 2(a) like a *per se* offense, in which the showing of a mere price difference automatically suffices to prove liability unless the seller qualifies for one of the

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[8] *See Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1982).

narrow safe harbors provided by the Act.[9] This interpretation clearly is inconsistent with this Court's decisions which establish that a particular practice may be treated as *per se* illegal only if it has pernicious effects on competition which have been proven over time.[10] That demanding standard is not satisfied here.

The Ninth Circuit thus has ignored Section 2(a)'s intended function among the antitrust laws and turned it into "a font of tort law for battered businesses." *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1340-41 (8th Cir. 1987).

A. The Text Of The Robinson-Patman Act Permits The Defendant To Introduce Evidence Of Absence Of Injury To Competition

Section 2(a) provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them.

In order to recover under Section 2(a), the plaintiff must prove three elements: (1) that the defendant

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[9] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990), quoting *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982).

[10] *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1983).

discriminated in price between two entities; (2) which produced "injury to competition"; and (3) the plaintiff suffered "antitrust injury" -- that is, the alleged price discrimination produced effects of the type the antitrust laws were intended to prevent. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 556, 559 (1990); *J. Truett Payne Co. v. Chrysler Motors Corp*, 451 U.S. 557, 562 (1981).

1. The Court has held that the "price discrimination" element may be satisfied by proof of a mere difference in prices. *Anheuser-Busch*, 363 U.S. at 550. *Morton Salt* further provides that an inference of injury to competition may be drawn from the showing of a substantial price discrimination to a single competitor.[11] Such an inference may satisfy plaintiff's obligation to make out a *prima facie* case on this element, and thereby justify submitting the case to the jury. However, nothing in *Morton Salt* and its progeny suggests that this inference may not be rebutted by evidence of the actual effect of the alleged difference in prices on competition. To the contrary, prior decisions of this Court and the lower courts demonstrate that the plaintiff must *prove* harm to competition and that the seller may rebut his *prima facie* showing in numerous ways, with a variety of types of evidence.[12] Once the plaintiff has made out its

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[11] In *Hasbrouck*, the Court described this point as the "holding" in *Morton Salt*. 496 U.S. at 559. However, it is not clear from *Morton Salt* that this was in fact the basis of the Court's decision. In the opinion, there are repeated references to the FTC having *proved* actual injury to competition through substantial evidence. 334 U.S. at 46-48.

[12] Rowe identified four instances in which the inference of injury to competition is rebutted: (1) if there are intervening economic factors; (2) when competitive injury is attributable to competitive inertia by the disfavored buyer (*e.g.*, a refusal to lower price to remain competitive); (3) when the discriminatory price is also available from another source; and (4) if the price advantage gained by the favored buyer is offset by costs. ROWE at 186-95. These four types of rebuttal

prima facie case, the defendant should be allowed to rebut any inference of harm to competition with evidence that competition in the relevant market remains vigorous.[13]

The Ninth Circuit has essentially eliminated the "injury to competition" element as part of plaintiff's proof. It has converted a *prima facie* showing into a conclusive proof of "injury to competition", by denying the defendant

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Footnote continued from previous page

evidence have successfully been employed in a number of lower court cases. *See, e.g., Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655, 664 (10th Cir. 1991)(no injury to competition if same price is available to buyer from another seller); *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1976)(same); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 703-04 (9th Cir. 1964) (same); *Alexander v. Texas Co.*, 165 F. Supp. 53, 58, 59 (W.D. La. 1958)(gasoline dealer sued suppliers for having granted discriminatory price reduction to assist in coping with a local "price war"; plaintiff's own refusal to reduce prices to prevailing "price war" levels caused alleged injury); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 792 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952)(price discrimination in sale of a component part had little impact on price for completed product because the ultimate cost of the product sold was determined by many other factors, such as advertising).

[13] Commentators such as Rowe have concluded that a number of factors may indicate the absence of competitive injury, such as (1) decline in the seller's market share, notwithstanding price differentials, (2) minor overall market position of the seller, (3) growth of the seller's competitors, (4) prevalence of comparable price variations on the part of competitors, (5) inroads by sellers on each others' customers, (6) ease of entry by new sellers, (7) overall dynamism of market, (8) competition by seller against strongly entrenched regional competitors, (9) effort by seller to improve his deteriorating market position, or temporary price experimentation to this end. ROWE at 160-61; *see also Brooke Group*, 509 U.S. at 226 ("essential components of real market injury" include the degree of competition in the market, ease of entry, and indications that the defendant cannot absorb market share of rivals because of lack of capacity).

the ability to counter that showing with evidence of the actual state of competition. Under the decision below, the inquiry jumps directly from proof of a price difference to the question of whether the harm allegedly caused to plaintiff qualifies as "antitrust injury."

2. The Ninth Circuit ignored the language of Section 2(a) that expressly provides for consideration of evidence of the actual state of competition in resolving the "injury to competition" element. The relevant portion of Section 2(a) prohibits price discrimination that may "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them". Under this provision, the alleged effect on competition may be analyzed from three vantage points. Evidence of the state of competition in the affected market is relevant in each instance.

-- First, insofar as the provision addresses "competition with any person who . . . grants" a favorable price, Section 2(a) is concerned with primary-line discrimination. In *Brooke Group*, the Court determined that evidence of competition in the primary market is relevant to resolution of such a claim. 509 U.S. at 226.

-- The next phrase in the statute prohibits price discrimination that may "injure, destroy or prevent competition with any person who . . . *knowingly receives* the benefits of such discrimination." This provision is concerned with secondary-line discrimination. It requires the reviewing court to analyze the state of competition from the point of view of a favored distributor which knowingly receives a price discount from the seller. Evidence concerning the competitive position of the favored distributor is the focal point of this inquiry, consistent with the legislative history of the Act focusing on "power buyers" such as national grocery chains. *See FTC v. Morton Salt Co.*, 334 U.S. at 43. The defendant therefore is entitled to

introduce evidence of the overall state of competition in the market and how the favored distributor stands with respect to that competition.

-- The final phrase prohibits price discrimination that may "injure, destroy or prevent competition . . . with customers of either" a discriminating seller or a favored buyer. This provision thus may address either secondary-line (customers of a seller) or tertiary-line discrimination (customers of a knowing recipient of a price differential). In either event, the statute requires the court to analyze "competition . . . with customers". This is a factual question, as to which the defendant is entitled to introduce relevant evidence of the competitive position of the various -- plural -- entities in the market.

The Ninth Circuit, however, did not follow the language of Section 2(a) with respect to the proof relevant to the "injury to competition" element. The court of appeals looked at the evidence exclusively from the point of view of the disfavored distributor alone and asked whether its ability to compete had been adversely affected. This inquiry is appropriate under Robinson-Patman, but not for the "injury to competition" element of the offense. Rather, it is relevant to the "antitrust injury" question, where in order to recover treble damages, the plaintiff must prove that the alleged price discrimination caused it damages of the type the antitrust laws were intended to prohibit. For the "injury to competition" element, however, the statute authorizes the seller to defend by introducing evidence of competition.

3. The Ninth Circuit's decision ignores the differences between Section 2(a) and Sections 2(d) and 2(e), which prohibit discrimination in the provision of promotional allowances and services, without requiring proof of injury to competition. The courts have treated Sections 2(d) and 2(e) as creating *per se* offenses. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). By allowing a Section

2(a) offense to be proved by a conclusive inference, without regard to actual evidence about competition in the market, the court of appeals essentially has eliminated an essential element of the offense. This is contrary to the plain language of the statute. Congress clearly knew how to dispense with the requirement of proof of injury to competition when it wished, but chose to include such an element in Section 2(a). The Ninth Circuit's decision, however, effectively reads that requirement out of the statute.

B. The Ninth Circuit's Application Of Section 2(a) To Secondary-Line Competition Is Inconsistent With This Court's Application Of This Provision To Primary-Line Competition

The Ninth Circuit recognized that this Court in *Brooke Group* had construed Section 2(a) to require consideration of evidence concerning the degree of competition in the relevant market. However, the court of appeals declined to apply the principles of *Brooke Group* to this secondary-line case, based on its interpretation of the legislative history. Its refusal to follow *Brooke Group* creates intolerable confusion about the proper construction of Section 2(a) and warrants review by this Court.

In *Brooke Group*, the Court stated that Section 2(a) "should be construed consistently with broader policies of the antitrust laws". 509 U.S. at 220. It further concluded that Congress "did not intend to outlaw price differences that result from or further the forces of competition". *Id.* Rather, the Court analyzed "essential components of real market injury", including factors such as whether "the market is highly diffuse and competitive" and whether "new entry is easy". *Id.* at 226. In particular, the Court cautioned against excessive reliance on inferences in deciding Section 2(a) cases, because "the costs of an erroneous finding of liability are high" and "mistaken inferences . . . are especially costly,

because they chill the very conduct the antitrust laws are designed to protect." *Id.*

The Ninth Circuit refused to apply these principles because of what it found to be "significant differences between primary- and secondary-line claims". (Pet. App. at 11a). However, there is no basis in the statute for drawing such an analytical distinction between primary- and secondary-line discrimination. The apparent distinction on which the Ninth Circuit relied so heavily is not a distinction found in the text of the statute, but simply a form of shorthand developed by the courts to explain their reasoning.[14]

By refusing to follow *Brooke Group*, the Ninth Circuit has inappropriately widened the gap between the application of Section 2(a) in primary- and secondary-line cases. Nothing in the language of the statute or *Brooke Group* suggests that the concept of what constitutes injury to "competition" should be applied in a fundamentally different fashion in primary- and secondary-line cases. Indeed, as one commentator has concluded:

> It would be incongruous, indeed, were the Act to be interpreted as concerned with competition and the consumer welfare as to primary-line competition, but not as to secondary- line competition, especially when the same competitive effects language applies

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[14] JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS & TRADE REGULATION § 38.01 (2d ed. 1997) ("Section 2(a), on its face, seems to apply the same standards of competitive injury regardless of the level at which the injury occurred. But the courts and the [FTC] view differently the consequences of pricing practices at each level, and require different standards of proof to establish the substantiality of adverse effects on competition at different levels"); ROWE at 124.

to both levels of competition. Such an interpretation would result in legal schizophrenia.[15]

C. The Court Should Determine Whether Section 2(a), In Secondary-Line Cases, Is To Be Interpreted Consistently With The Other Antitrust Laws

In holding that an inference of injury to competition, once invoked, is not rebuttable with evidence of healthy competition at the distributor level, the Ninth Circuit has subscribed to a reading of Section 2(a) which aggravates the conflict between the Act and the rest of the antitrust laws. In *Brooke Group,* the Court stated that "it is axiomatic that the antitrust laws were passed for 'the protection of *competition,* not *competitors.*" 509 U.S. at 220 (citation omitted). This principle, although articulated in the context of a primary-line case, should apply to secondary-line cases as well, since the same statutory language applies in both instances.

In holding that robust competition at the distributor level is irrelevant to the injury element, the court of appeals ignored this Court's instruction that the Robinson-Patman Act should be construed in a manner consistent with the other antitrust laws.[16] The Petition makes a compelling

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[15] Paul LaRue, *The Robinson-Patman Act in the Twenty-First Century: Will The Morton Salt Rule Be Retired?* 48 SMU L. Rev. 1917, 1927 (1995); HOVENKAMP at § 14.6a (after *Brooke Group*, "there is a major anomaly in the way that the same statutory language is interpreted in primary-line as opposed to secondary-line situations. A reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue").

[16] *See, e.g., Brooke Group,* 509 U.S. at 220; *Great Atl. & Pac. Tea Co. v. FTC,* 440 U.S. 69, 80 (1979)(citations omitted)(expressing concern about "interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act ... [thus] giving rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation'"); *United States v. U.S. Gypsum Co.*, 438 U.S. 422,

showing (Pet. at 17-19) that the decision below conflicts with several Supreme Court decisions over the last decade, which uniformly rejected interpretations of Section 2(a) that would have improperly protected individual competitors by erecting barriers to price reductions and deterring welfare-enhancing distribution practices.

Further, there is a fundamental inconsistency between the lower court's treatment of the *Morton Salt* inference and the Court's development of the antitrust injury doctrine in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 340, and *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. at 557. This Court has repeatedly emphasized that there must be antitrust injury before liability may be imposed under any antitrust statute, including the Robinson-Patman Act, and that *Morton Salt* antitrust injury requires proof of adverse effects on *competition*. Indeed, in *Brooke Group*, this Court relied on its earlier decision in *Atlantic Richfield* in concluding that the procompetitive benefits of pricing practices are entitled to substantial weight in enforcing the Robinson-Patman Act:

> Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . . We have adhered to this principle regardless of the type of antitrust claim involved.

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447-459 (1978); *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953)(there is a "duty to reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress"); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)(antitrust laws were generally designed to "protect competition, not competitors").

509 U.S. at 223, *quoting Atlantic Richfield,* 495 U.S. at 340.

Here, however, the Ninth Circuit has sanctioned a conclusive inference of injury to competition even where the seller lacks market power, competition in the product market is robust, no distributor has market power, barriers to entry are low, and the difference in price allegedly involved is approximately 2%. (Pet. App. at 14a). Rather than promoting antitrust goals and "seeking to preserve competition in order to guarantee the consuming public the progress and benefits of enterprise," it has applied Section 2(a) to "protect individual business firms from the discomforts of vigorous competition."[17]

CONCLUSION

For the foregoing reasons, *amici curiae* Hewlett-Packard Company and Compaq Computer Corporation respectfully submit that the Petition for a Writ of Certiorari should be granted.

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[17] ROWE at 130.